No. 89-1474

In The

Supreme Court of the United States

October Term, 1990

McDERMOTT INTERNATIONAL, INC.,

Petitioner,

vs.

JON C. WILANDER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

The following statement of the case is deemed necessary by respondent to correct inaccuracies and omissions from the statement propounded by petitioner.

First of all, it should be noted that, at the time of Mr. Wilander's injury in 1983, petitioner McDermott International, Inc. maintained its principal place of business in New Orleans, Louisiana. (RI Vol. 5, pp. 5, 6). At the time that Wilander began his employment with McDermott International, and signed his contract for employment in New Orleans, that company was a wholly-owned subsidiary of McDermott, Inc., an American corporation. (RI Vol. 5, pp. 5, 11, 18).

Jon Wilander is and has always been an American citizen. (RI Vol. 6, p. 4). Following his employment with McDermott International, he was issued a seaman's card and a passport. (RI Vol. 6, pp. 7, 9, Pl. Ex. Vol. 6, pp. 8, 9; J.A. 156, 44). He worked ninety-day hitches in the Persian Gulf, always as a paint supervisor on a project involving a derrick barge or a derrick barge and a paint boat. (RI Vol. 6, p. 72). All of the work performed by Mr. Wilander was done over water in the Persian Gulf, out of sight of land. He had no shoreside duties. (RI Vol. 6, p. 73). He was denominated as a member of the crew of the Derrick Barge 9 by the captain of that vessel. (RI Vol. 9, pp. 419-420).

Wilander's employer assigned him to various vessels serving as paint boats throughout the tenure of his employment, the last of which was the *M/V GATES TIDE*. (RI Vol. I, 382, 388, Vol. 6, 31, 48). During a typical operation, Wilander would supervise the loading of the paint boat from a supply vessel. (RI Vol. 6, 33). He would give the captain of the paint boat instructions as to their destination. Upon arrival at the platform to be painted, Wilander would direct the captain as to where to position the boat so that the equipment aboard could be utilized properly. (RI Vol. 7, 34). All equipment needed to perform the painting and sandblasting operations of Wilander's

crew was kept aboard the paint boat, including compressors, sandblasting pot, paint pots, cargo containers, pallets, air supply and tools. (RI Vol. 6, 40-41).

The paint boat had to be positioned in such a manner that the hoses located on the vessel could reach the work area on the platform, since the air supply and compressor remained on the boat at all times. Wilander conducted his supervision of these operations from the deck of the paint boat. (RI Vol. 6, 41). Wilander testified that he spent ninety per cent of his time during his tenure of employment with McDermott working either aboard the Derrick Barge 9 or the vessel to which he was assigned as a paint boat. (RI Vol. 6, 93)

The mission of the *GATES TIDE* was to serve as a paint boat, to accommodate the painting/sandblasting crew. The vessel is referred to as a paint boat by McDermott in their daily job reports for the period just prior to Wilander's injury. (J.A. 174). The work of the paint crew could not be performed without the vessel. (RI Vol. 6, pp. 26-28, 30-32, Vol. 9, p. 389).

Wilander was injured when a line he was checking for leaks aboard a small platform exploded. He was not informed that the line was being hydrotested at the time, due to a failure of communication among the McDermott supervisors, located miles away over open sea. (RII Vol. 13, pp. 292-94, 95, Vol. 14, p. 537, Vol. 13, p. 306).

Petitioner's recitation of the course of proceedings below, including the repeated attacks of McDermott on Mr. Wilander's status, is correct. The jury in this case found that Wilander was substantially connected to *and* contributed to the mission of both the Derrick Barge 9 and the *GATES TIDE*. The Fifth Circuit affirmed the factual findings of the lower court.

> In this case the evidence established that the plaintiff performed a substantial part of his work, directing the sandblasting and painting of fixed platforms, from the *GATES TIDE*. Further, the *GATES TIDE* functioned as a paint boat.

> Consequently, the plaintiff's duties contributed to the function of the vessel. There was, therefore, sufficient evidence to support the jury's finding that the plaintiff had status as a seaman. 887 F.2d at 90.

In dicta, the court noted (at 887 F.2d 90, n.1) that Wilander would not qualify as a seaman under the test of *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984), although Wilander testified that he aided in navigation and on occasion actually steered the vessel. (RI Vol. 6, pp. 178-180; Vol. 8, p. 284; Pl. Ex. 16 & 17, Vol. 6, p. 54; J.A. 168).

SUMMARY OF THE ARGUMENT

Both prior and subsequent to the passage of the Jones Act, 46 U.S.C. 688, American courts have broadly interpreted the requirement that a seaman "aid in navigation" of the vessel to which he has attached.

This interpretation is in keeping with the broad purposes of the Act, which is designed to protect employees who are required to work in a hazardous maritime environment.

The test of seaman status set forth by the Fifth Circuit in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959) is an accurate synthesis of the guidelines established by the United States Supreme Court and serves to further the purposes of the Jones Act.

Both Congress and the Supreme Court have expressed the intention to provide coverage under the Jones Act for employees such as Wilander, who work aboard special purpose vessels engaged in offshore oil production.

The Seventh Circuit rule of seaman status set forth in *Johnson v. John F. Beasley*, supra, not only is in direct and irreconcilable conflict with prior decisions of this court, but thwarts the policy behind the Jones Act.

The Supreme Court should adopt a uniform rule for seaman status which grants Jones Act remedies to all workers who contribute to the economic viability and mission of the vessel to which they are assigned.

ARGUMENT

I. EARLY DEVELOPMENT AND EROSION OF THE "AID TO NAVIGATION" REQUIREMENT FOR SEAMAN STATUS

The evolution of admiralty doctrine in the American courts has a history as long and varied as that of our country itself. The current state of technology found in modern maritime commerce is, indeed, far removed from the sailing ships familiar to our nineteenth century forefathers. It is this continuous process of technological evolution which has been the basis for and the policy behind the concurrent growth and development of the rights of the American seaman.

In the days of the tall ships, the concept developed that a seaman's remedies should be reserved only to those able to "hand, reef and steer", which was considered "the ordinary test of seamanship". *The CANTON*, 5 F. Cas. 29, 30 (D. Mass. 1858) (No. 2,388). Application of this archaic formula led to different status classifications for employees aboard the same vessel. For example, the court in *Black v. The LOUISIANA*, 3 F.Cas. 503 (D.Pa. 1804)(No. 1,461) distinguished between the cook and the steward and "mariners employed in navigating the vessel."

With the advent of the steam-powered vessel, the doctrine began the process of alteration to meet the changing needs of the industry. Engerrand and Bale, "Seaman Status Reconsidered", 24 S.Tex.L.J. 431, 432 (1983).

> A great change has taken place in the last half century in the functions of seamen on steamboats. Long after steam had become the main motive power, ocean-going ships were equipped with masts and sails, which were frequently used to supplement the steam. The deck hand was a sailor as well as a seaman. He had to understand how to handle the rigging of a ship and know the technique of his calling. Now, as has been frequently pointed out, the steamships make practically no use of sails and the seaman is mainly occupied in cleaning the decks, polishing the brasses, and acting as lookout. Comparatively few men are needed for this purpose, and it is not especially important that they should either be able to understand the officers or that they should have had experience in their calling in normal times.
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> H. Farnam, The Seamen's Act of 1915, S.Doc. No. 333, 64th Cong., 1st Sess. 13 (1916).

The often-quoted statement that a seaman must "aid in navigation" of the vessel appears to have originated in *The BOUND BROOK*, 146 F. 160, 164 (D.Mass. 1906). This case was a libel for wages brought by certain foreign seamen and firemen who served aboard a German vessel but signed their articles in this country. The issue was whether the court would decline to assert admiralty jurisdiction over the claim in deference to a treaty between the United States and Germany which reserved to the German consul in the United States the "exclusive power to . . . determine differences of every kind . . . between the captains, officers and crews . . . specifically in reference to wages." *The BOUND BROOK*, supra at 160. In this context, the court determined that the "seaman and firemen" were members of the crew, and therefore declined to accept jurisdiction. In interpreting the treaty provision, the court noted, "When the 'crew' of a vessel is referred to, those persons are naturally and primarily meant who

are on board her aiding in her navigation, without reference to the nature of the arrangements under which they are on board."

Engerrand and Bale note that "(t)he 'aid in navigation' test was subtly modified almost from its inception". Supra at p. 433. It is doubtful if this term was ever used in the context intended by the author of *The BOUND BROOK*; "naturally and primarily meant" became "naturally and primarily on board aiding in navigation".

Even earlier cases took a broader view of the "aid to navigation" requirement and expanded the definition of a seaman far beyond those who "hand, reef and steer."

For example, in *The OCEAN SPRAY*, 18 F.Cas. 558 (D.Ore. 1876) (No. 10,412), another libel for wages was brought by certain Indians who were taken aboard a vessel about to go on a voyage for the purpose of hunting fur seals. The Indians were to serve as "sealers" and actually take the animals. Since the Indians could not speak English, the vessel employed interpreters, who also joined in the claim for wages. However, the voyage was abandoned before any seals were taken, and the vessel opposed the claim on the ground that neither the sealers nor the interpreters had ever served as "mariners" on the voyage. But the court disagreed, reasoning that all who were "co-laborers in the leading purpose of the voyage", should be entitled to the same benefits. Supra at 560.

> . . . A principle of law, as that the persons on a vessel who are employed in promoting the purpose of the voyage or aiding in her navigation shall have a lien upon her for their wages, must be applied to new cases within the reason of the rule, as they arise.
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> . . . (T)here are other functions besides these of mere navigation, and they are performed by men who know nothing of seamanship – and in the great invention of modern times, the steamboat, an entirely new set of operatives, are employed, yet at all times and in all countries,

> all the persons who have been necessarily or properly employed in a vessel as co-labourers to the great purpose of the voyage, have, by the law, been clothed with the legal rights of mariners – no matter what might be their sex, character, station, or profession.
>
> E. Benedict. *The American Admiralty, Its Jurisdiction and Practice*, 7th Ed. (1850), Sec. 241 at 134.

Other cases employing a similar line of reasoning are collected by Engerrand and Bale,"Seaman Status Reconsidered", 24 S.Tex.L.J. 431, 434 n.20 (1983) including *Saylor v. Taylor*, 77 F. 476, 479 (4th Cir. 1896), finding that seamen included all who were "employed in any capacity and whose labor contributes in any degree, however slight, to the accomplishment of the main object in which the vessel is engaged". Saylor relied in part on the definition of "seaman" found in Section 4612 of the Revised Statutes, to-wit:

> In the construction of this title every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof, and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'.

See also *The J. S. WARDEN*, 175 F. 314, 315 (S.D.N.Y. 1910) (which holds that a seaman is one who "further(s) the purpose of (the ship's) voyage") and *The MINNA*, 11 F. 759, 760 (E.D. Mich. 1882)(a seaman is one who acts in "furtherance of the main object of the enterprise in which (the vessel) is engaged").

In *The BUENA VENTURA*, 243 F. 797 (S.D.N.Y. 1916), the court was called upon to determine if a "wireless operator" aboard a vessel should be considered a seaman. The court discussed prior jurisprudence, most notably *The BOUND BROOK*, 146 F. 160 (D.Mass. 1906) and *United States v. Winn*, 3 Sumn. 209, Fed. Case No. 16,740

(wherein Justice Story found the term "crew" equivalent to the ship's company).

> The word "seaman" undoubtedly once meant a person who could "hand, reef and steer", a mariner in the true sense of the word. But as the necessities of ships increased, so the word "seaman" enlarged its meaning . . . But the reason of the matter is shown best by Judge Benedict's decision in *The NORTH AMERICA*, 5 Ben. 486, Fed. Cas. No. 10,314, wherein he held that a fireman was a seaman. The reason for such generous interpretation of so simple a word as "seaman" is that every one is entitled to the privilege of a seaman who, like seaman, at all times contribute to and labor about the operation and welfare of the ship when she is upon a voyage. When mariners in the old sense of the term were the only persons who enabled the ship to go in safety, then they were the only seamen; when firemen contributed quite as much as the deck hands to that end, they became seamen in the eye of the law. And in my judgment a wireless operator is to-day a far more important person in the safe operation of a voyaging vessel than is any one imaginable fireman, cook or the like.
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> 243 F. at 799.

By the early twentieth century, such workers as bartenders, horsemen, muleteers, coopers, pursers, cooks, stewards, engineers, divers, clerks and others had been held to be seamen. See Engerrand and Bale, "Seaman Status Reconsidered", 24 S.Tex.L.J. 431 (434-435, notes 29, 30 (1983)).

II. DEVELOPMENT OF STATUTORY REMEDIES FOR MARITIME WORKERS

In 1903, the United States Supreme Court in *In re The OSCEOLA*, 289 U. S. 158, 23 S.Ct. 483, 47 L.E. 760 (1903), held that all members of the crew of a vessel were to be

considered fellow servants. Therefore, a seaman was precluded under the law from recovering for injuries sustained because of the negligence of another crewman.[1]

In response to this decision, and to the sinking of the *TITANIC* in April of 1912, Congress passed the Merchant Marine Act of 1915. 38 Stat. 1164. Section 20 of the Act attempted to overrule the above-referenced portion of The OSCEOLA by providing, "That in any suit to recover damages for any injury sustained on board a vessel or in its service, seamen having command shall not be held to be fellow-servants with those under their authority." 38 Stat. 1164, 1185. However, the efforts of Congress proved to be inadequate in this regard, since the Supreme Court held in *Chelentis v. Luckenbach Steamship Co. Inc.*, 247 U.S. 372, 38 S.Ct. 501, 62 L.E. 1172 (1918) that the seaman still had no negligence remedy against his employer; therefore, abrogation of the fellow servant rule was not enough to give the seaman a remedy for injuries sustained due to the torts of his co-workers. To legislatively overrule *Chelentis*, Congress passed The Merchant Marine Act of 1920, or the Jones Act, 41 Stat. 988, codified at 46 U.S.C. 688 (1976), and granted a negligence action to "any seaman".

Seven years intervened between the passage of the Jones Act and the enactment by Congress of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 44 Stat. 1424, 33 U.S.C. 901-50 (1976), establishing a federal compensation scheme for land-based maritime workers. Prior to passage of the LHWCA, the Supreme Court repeatedly struck down attempts to apply state workman's compensation schemes to longshoremen, who were considered maritime workers and whose claims came within the admiralty jurisdiction of the

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[1] The court did hold that the seaman would be entitled to maintenance and cure for such injuries. 189 U. S. at 175.

court. See *Atlantic Transport Co. of W. Virginia v. Imbrovek*, 234 U.S. 52, 34 S.Ct. 733, 58 L.E. 1208 (1914); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.E. 1085 (1917); *Knickerbocker Ice Co. v. Stewart*, 252 U.S. 149, 40 S.Ct. 438 (1920); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219, 44 S.Ct. 302, 68 L.E. 646 (1924).

Each case reasoned that the maritime law was exclusively federal domain, and that no state should be permitted to alter the maritime law. It was during this period that the United States Supreme Court held, in *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 47 S.Ct. 19, 71 L.E. 157 (1926), that a longshoreman was a seaman within the meaning of the Jones Act. The plaintiff in that case was a longshoreman injured while working aboard a vessel which was moored to a dock. He brought suit under the Jones Act against his employer, a stevedoring company. The Court adopted an expansive test for seaman's status, holding, at 272 U.S. 52:

> It is true that for most purposes, as the word is commonly used, stevedores are not "seamen". *But words are flexible.* The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew. *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 62. We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship. *The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of business. If they should be protected in the one case they should be in the other. In view of the broad field in which Congress has disapproved and changed the rule introduced into the common law within less than a century, we are of opinion that a wider scope should be given to the words of the act*, and that in this statute "seamen" is to be taken to include stevedores employed in

> maritime work on navigable waters as the plaintiff was, whatever it might mean in laws of a different kind.[2]
>
> (emphasis added)

Following the *Haverty* decision, Congress passed the LHWCA. The compensation scheme established thereunder was deemed the exclusive remedy for the injured worker as against his employer, if the worker was injured "upon the navigable waters of the United States (including any dry dock)." 33 USC 903(3) (a). The Act excluded from its coverage "a master or member of a crew of any vessel". 33 USC 903(3), 903(a) (1).[3]

The relationship between the Jones Act and the LHWCA was addressed by this court in the case of *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 66 S.Ct. 869, 90 L.E. 1045 (1946). The claimant was a longshoreman who sought to sue his employer under the Jones Act, as in the *Haverty* case. However, unlike *Haverty*, the plaintiff in this case was injured while off the vessel, on a pier. The Court concluded that the enactment of the LHWCA following the *Haverty* case dictated the result that Jones Act remedies would be reserved to "the members of the crew of a vessel plying in navigable water" and longshoremen would receive "only such rights to compensation as are given by the Longshoremen's Act". *Swanson v. Marra Brothers, Inc.*, supra at 7. However, since Swanson was

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[2] Professor Robertson notes that "The *Haverty* holding that longshoremen injured on water were Jones Act "seamen" was followed in several other Supreme Court decisions arising between 1920 and 1927." Robertson, "A New Approach to Determining Seaman Status", 64 Texas L.R. 79, 85 (1985).

[3] The constitutionality of both the Jones Act and the LHWCA was upheld by the Supreme Court. *Panama R.R. v. Johnson*, 264 U.S. 375, 44 S.Ct. 391, 68 L.E. 748 (1924) and *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.E. 598 (1932).

injured on the dock, he was not covered under the LHWCA, and could only resort to whatever remedies were accorded by state law.

Professor Robertson notes that there still exists an area of overlapping coverage between the Jones Act and LHWCA:

> The theoretical mutual exclusivity of the Jones Act and LHWCA does not invariably prevent marginal workers from access to both systems. E.g., *Simms v. Valley Line Co.*, 709 F.2d 409, 411 (5th Cir. 1983); *McDermott, Inc. v. Boudreaux*, 679 F.2d 452, 459 (5th Cir. 1982). The 1984 amendments to LHWCA appear to recognize the functional overlap between the two systems in an uncertain zone at their intersection, by enacting a new § 903(e) that requires a credit against LHWCA recovery in the amount of any seamen's benefits received by the worker. 1984 U.S. Code Cong. & AD. News (98 Stat.) at 1641.
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> Robertson, supra p. 86, n. 40.

We would note at this point that in *Pizzitola v. Electro-Coal Transfer Corp.*, 812 F.2d 977 (5th Cir. 1987), the Fifth Circuit affirmed the granting of a judgment notwithstanding the verdict by a lower court holding that, as a matter of law, a harbor-bound employee engaged in an occupation specifically enumerated in the LHWCA is not a seaman under the Jones Act, and that an analysis of status under *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959), is unnecessary once it is determined that the harbor-worker's job is so classified under the Act.

Pizzitola was flatly repudiated by the Fifth Circuit in *Legros v. Panther Services Group, Inc.*, 863 F.2d 345 (5th Cir. 1988). That case involved a ship repairman (an occupation specifically enumerated in the LHWCA). The court held that the *Robison* test is still the standard for reviewing LHWCA and Jones Act determinations; and that *Pizzitola* was correct on the facts of that case, but incorrect in its analysis. However, the *Legros* panel opinion was

vacated when the case was settled subsequent to granting of rehearing en banc.

The Fifth Circuit has emasculated *Pizzitola* in subsequent decisions, including *Leonard v. Dixie Well Service & Supply*, 828 F.2d 291 (5th Cir. 1987), wherein the court observed that the result in *Pizzitola* was based on the fact that the claimant was a ship repairman who indisputably spent 75 per cent of his work time ashore. In *Thibodeaux v. Torch, Inc.*, 858 F.2d 1048 (5th Cir. 1988), the plaintiff was injured while working on shore loading pipe onto a barge. The trial court granted summary judgment against the plaintiff on the issue of Jones Act status, relying on *Pizzitola*. However, the Fifth Circuit reversed, holding that the trial court misinterpreted *Pizzitola* by looking only at the plaintiff's job at the time of his injury. Since the worker usually spent most of his time as a vessel-based crane operator, denial of status via summary judgment was inappropriate.

According to this Court, the 1972 amendment to the LHWCA which added the status requirement was meant only to expand shoreside coverage. Coverage on the water side of the shorelines was unchanged by those amendments. *Director, OWP, USDL v. Perini North River Assoc.*, 459 U.S. 297, 103 S.Ct. 634, 74 L.E.2d 465 (1983). Therefore, any assertion that the 1972 amendments should serve as the basis for modification of Jones Act coverage is without merit.

III. SUPREME COURT INTERPRETATION OF SEAMAN STATUS

Beginning in the 1940's, the Supreme Court began a two-decade long process of gradually defining the parameters of seaman status under the Jones Act. Our analysis begins with the case of *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 60 S.Ct. 544, 84 L.E. 732 (1940). In order to properly understand the court's holding in that case, the context in which it arose must be examined.

The claimant worked aboard a lighter and his job was to facilitate the flow of coal from the lighter to the vessel which was being fueled. Following his injury, he brought suit, not under the Jones Act, but to recover benefits under the LHWCA. The Deputy Commissioner ruled that the claimant was entitled to LHWCA benefits and not a "member of a crew" within the meaning of that Act. The Court of Appeals reversed but the Supreme Court reinstated the Deputy Commissioner's ruling. This case arose before the Court had held that the Jones Act and the LHWCA were (at least theoretically) mutually exclusive.[4]

Next before the Court was *Norton v. Warner Co.*, 321 U.S. 565, 64 S.Ct. 747, 88 L.E. 931 (1944), which significantly expanded the definition of a seaman. The claimant was a handyman employed to take care of a barge docked at a pier. The vessel never went to sea and did not have its own means of propulsion. The injured worker filed for LHWCA benefits and was found to be within the Act by the Deputy Commissioner, but the court of appeal reversed, holding that the worker was a member of a crew of a vessel, thereby excluded from coverage. The

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[4] See discussion of *Swanson*, infra at pp. 11-12. Professor Robertson analyzes *Bassett*'s holding that the claimant was not a seaman as follows (at p. 86, citations omitted, footnotes omitted):

> The major thrust of the Court's opinion was deference to the administrative tribunal's finding that the worker was not excluded from LHWCA coverage by the "member of a crew" language. The Court emphasized that crew member status is ordinarily a question of fact and that the administrator's finding of LHWCA coverage was conclusive if evidence supported it. Cautioning that its holding construed only the LHWCA, and not "other statutes having other purposes," the Court defined crew members as "those employees on the vessel who are naturally and primarily on board to aid in her navigation."

Supreme Court, as per Mr. Justice Douglas, found that Rusin, the claimant, "had that permanent attachment to the vessel which commonly characterizes a crew," (at 321 U.S. 573) and specifically repudiated the idea that the "aid in navigation" requirement for status should be given the restrictive interpretation advanced by petitioner in the case sub judice.

> If a barge without motive power of its own can have a "crew" within the meaning of the Act and if a "crew" may consist of one man, we do not see why Rusin does not meet the requirements. A barge is a vessel within the meaning of the Act even when it has no motive power of its own, since it is a means of transportation on water.[4] A crew is generally "equivalent to ship's company" as Mr. Justice Story said in *United States v. Winn*, Fed. Cas. No. 16,740, 28 Fed. Cas. 733,737. But we pointed out in the *Bassett* case that the word does not have "an absolutely unvarying legal significance." 309 U. S. at p. 258. *We said in the Bassett case that the term "crew" embraced those "who are naturally and primarily on board" the vessel "to aid in her navigation."* Id., p. 260. *But navigation is not limited to "putting over the helm." It also embraces duties essential for other purposes of the vessel. Certainly members of the crew are not confined to those who can "hand, reef and steer."* Judge Hough pointed out in *The BUENA VENTURA*, 243 F. 797, 799, that "every one is entitled to the privilege of a seaman who, like seamen, at all times contributes to the labors about the operation and welfare of the ship when she is upon a voyage." And see *The MINNA*, 11 F. 759; *Disbrow v. Walsh Bros.*, 36 F. 607, 608 (bargeman). We think that "crew" must have at least as broad a meaning under the Act.
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> *(Rusin's duties) were indeed different from the functions of any other "crew" only as they were so*

by the nature of the vessel and its navigational requirements.

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[4] "Vessel" is defined in R.S. § 3, to include "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

(Additional footnotes omitted.) (Citations omitted) (emphasis added)

It is important to note, in examining the relationship between the *Bassett* and *Norton* decisions, that the comments of the Court in *Bassett* regarding the "aid in navigation" requirement were restricted to the context of LHWCA status. On the other hand, the more expansive holding of *Norton*, to the effect that a seaman is anyone aboard contributing to the vessel's operation and welfare during a voyage, was specifically directed to Jones Act coverage. Robertson, supra at 87-88.

The requirement that a seaman be affiliated with a vessel "in navigation" was developed by *Desper v. Starved Rock Ferry Co.*, 342 U. S. 187, 72 S.Ct. 216, 96 L.E. 205 (1952). The defendant employer in that case operated a small fleet of sightseeing boats which were put up on blocks for the winter months. The vessels would be overhauled in the spring of each year in anticipation of their use during the summer. Plaintiff was injured while making repairs during the off-season. Although the Court again stressed that the question of seaman status is almost always for the trier of fact (Id. at 190), status was denied in this case because all boats were "laid up for the winter." Id at 191.[5]

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[5] Professor Robertson summarizes the development of the "vessel in navigation" requirement at p. 88, n. 33 (Citations omitted):

(Continued on following page)

Following *Desper*, the state of the law on seaman status as set forth by the United States Supreme Court may be summarized as follows:

(1) In almost all cases, the determination of whether or not a worker should be classified as a seaman should be made by the trier of fact. *Bassett*, at 251 U.S. 257-58; *Norton*, at 321 U.S. 568-69; *Desper*, 342 U.S. at 190.

(2) In order to be a seaman, a worker must be aboard the vessel for the purpose of contributing to her operation and welfare during a voyage. *Norton*, at 321 U.S. 572.

(3) To be accorded seaman status, the worker must have a permanent attachment to a vessel. Id.

(4) Finally, the vessel to which the alleged seaman is attached must be "in navigation." *Desper*, 342 U.S. at 191.

Once the basic requirements had been delineated by the above cases, only four United States Supreme Court cases have arisen in which these provisions were applied. The result in each case totally repudiates the restrictive approach to status espoused by petitioner.

The first was *Gianfala v. Texas Co.*, 350 U.S. 879 (1955). This was the first case to bring before the Court the unique facts presented by offshore oil production in the Gulf of Mexico. The plaintiff worker died in an accident

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(Continued from previous page)

The "vessel in navigation" criterion, derived in large part from *Desper*, has been construed in a number of subsequent decisions. A vessel remains in navigation even though it is stationary for a lengthy period, drilling for oil, supporting a crane, engaging in construction activities and the like. It is not out of navigation while working. A vessel is taken out of navigation only when removed from service for extensive repairs or reconstruction.

which occurred while he was unloading pipe from a vessel onto a drilling barge.

The plaintiff had been assigned to work on the drilling barge during a schedule of six days on and six days off. He and his fellow crewmen were paid by the hour and slept on shore every night. The conditions of plaintiff's employment did not require him to stay aboard the drilling barge for any specified period of time. This worker had no duties in connection with the moving of the barge, which was done only about once a year. There were no navigation lights aboard the barge and at the time of the accident it had been sunk, and was resting on the bottom of the Gulf of Mexico while drilling operations were being conducted. At the close of the evidence, the defendant employer moved for a directed verdict on the ground that the plaintiff could not be considered a seaman and a member of the crew of a vessel plying on navigable waters in furtherance of commerce, but was instead a member of a drilling crew, using the sunken and secured barge as a part of the equipment for drilling an oil well. The lower court denied the motion, but the court of appeal reversed. *Texas Co. v. Gianfala*, 222 F.2d 382 (5th Cir. 1955). The Fifth Circuit reasoned that (1) the worker was not aboard a vessel in navigation and (2) he was not on board in aid of navigation.

> On the contrary he was aboard it, not as a member of a ship's crew but as a member of a drilling crew. He was then and there doing work which is done strictly and only by oil field workers, handling the tubing to be used in completing the well and he was certainly not a 'seaman in being.' (222 F.2d 387).

But the Supreme Court reversed and directed that the judgment of the lower court be reinstated, citing *Bassett*, supra, and the cases of *Summerlin v. Massman Construction Co.*, 199 F.2d 715 (4th Cir. 1952); *Wilkes v. Mississippi River*

Sand & Gravel Co., 202 F.2d 383 (6th Cir. 1953); and *Gahagan Construction Corp. v. Armao*, 165 F.2d 301 (1st Cir. 1948). The significance of the holdings of these cases is discussed infra, at p. 26.

The next case to be considered was *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 77 S.Ct. 415, 1 L.E.2d 404 (1957). In this case, the worker was a handyman aboard a dredging barge. The appellate court characterized him as an employee whose primary duties were to load supplies on the vessel while she was at anchor, and to perform incidental tasks of the character of common labor. The jury found that the plaintiff was a seaman under the Jones Act, but the court of appeal reversed. The Supreme Court reinstated the findings of the jury, holding

> We believe, however, that our decision in *South Chicago Co. v. Bassett*, supra, has not been fully understood. Our holding there that the determination of whether an injured person was a "member of a crew" is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate.
>
> Because there was testimony introduced by petitioner tending to show that he was employed almost solely on the dredge, that his duty was primarily to maintain the dredge during its anchorage and for its future trips, and that he would have a significant navigational function when the dredge was put in transit, we hold there was sufficient evidence in the record to support the finding that petitioner was a member of the dredge's crew. Cf. *Gianfala v. Texas Co.*, 350 U.S. 879, reversing 222 F.2d 382. Accordingly, we reverse the decision below.

Senko v. LaCrosse Dredging Corp., supra at 374.

Writing not long after this opinion was rendered, two commentators expressed the significance of this decision as follows:

> But the real significance of *Senko* seems to lie in the following:
>
> (A) The extent to which the Court went in finding a sufficiency of evidence as to Senko's being a member of a crew to warrant sending the case to the jury; and
>
> (B) The very strong trend apparent in the opinion to de-emphasize the importance of evidence as to actual "aiding in navigation" as a factor in deciding whether or not the claimant is "a member of a crew".
>
> Gisevius and Leppert, "Modern Maritime Workers", 9 Loyola L.Rev. 1, 7 (1957-58).

These writers went on to note:

> Certainly *Senko* stands for a final abandonment of the very narrow definition of the phrase "member of a crew" as conceived by the decisions of various Circuit Courts of Appeal quoted by the Supreme Court in *Bassett*, supra.

To sum up on the evolution of *Senko*, therefore, we find that the Supreme Court, by reversing the Fifth Circuit in *Gianfala*, allowed the Jones Act to apply to a man who, under no conceivable stretch of imagination could be said to be employed "primarily in aid of navigation" to come under the Jones Act. The other three distinctly sublimated this test to the extent we have shown. Moreover, even in *Bassett*, it is debatable whether or not the phrase was mere dicta, as the case actually turned upon whether or not there were sufficient facts to justify a holding by the commissioner that the Longshoremen's Act was the proper remedy, and was, of course, no attempt by the Supreme Court to actually weigh the facts.

Next we find the Supreme Court reversing the Supreme Court of Illinois in *Senko* in a case where there could be no serious pretense that the employee was aboard the dredge "primarily in aid of navigation" and to reach this conclusion the Court sublimated the navigational aspects of the employment and emphasized the connection with the vessel. Moreover, in so doing, the court expressly relied upon *Gianfala*. Gisevius and Leppert, supra at 8, 14.

With the benefit of thirty years of hindsight, Professor Robertson agrees with these conclusions:

> *Senko* puts an important gloss on the *Bassett-Norton-Depser* line of cases. It clearly negates the existence of any requirement that a seaman be aboard the vessel "naturally and primarily in aid of navigation," unless the term "navigation" is to be tortured into "maintenance during indefinitely extended anchorage." It shows that a vessel can be immobile for a very long period of time and still be considered "in navigation." Most importantly, it establishes that the status issue should reach the jury in all but the clearest cases.
>
> Robertson, supra at 90.

The following year, the Court decided *Grimes v. Raymond Concrete Piling Co.*, 356 U.S. 252, 78 S.Ct. 687, 2 L.E.2d 737 (1958). The plaintiff was employed as a pile driver in the construction of a "Texas Tower", which was a platform destined to serve as a permanent offshore radar installation. The tower was towed to its destination 110 miles offshore, and the plaintiff lived and worked aboard it while it was in transit. The plaintiff also engaged in pile driving operations to secure the tower to the ocean floor. Six days after the securing of the tower was completed, plaintiff went to work on a construction barge for a few hours and was injured while being transferred back to the tower in a life ring. The Supreme Court held that these facts presented a jury question as to

whether the plaintiff was a seaman under the Jones Act, citing *Senko, Gianfala* and *Bassett*.[6]

The last Supreme Court case to directly address the issue of seaman status was *Butler v. Whiteman*, 356 U.S. 281, 78 S.Ct. 734, 2 L.E.2d 754 (1958). The injured worker was a laborer employed by the defendant, who owned a wharf, barge and tug, all of which were lashed together. The tug had been withdrawn from navigation due to its inoperability and was undergoing a general overhaul. On the date of his death, he had been assigned to clean the tug's boilers. The Supreme Court held that there was an evidentiary basis for jury findings that the vessel was in navigation, and that the plaintiff was a seaman as to the tug boat.

The impact of these decisions may be summarized as follows:

> . . . The most significant thread is the Court's firm assignment of the vast majority of status determinations to the trier of fact . . .
>
> Some important criteria were identified. The decisions through *Senko* suggest that a worker is covered by the Jones Act and

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[6] Professor Robertson notes, at p. 91, n. 74:

> 74. The usual interpretation of *Grimes* – attributing seaman status to plaintiff's brief connection with the construction barge – is not a universal interpretation. For instance, Judge Brown, dissenting in *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337, 342 (5th Cir. 1982), cert. denied, 461 U.S. 958 (1983), read *Grimes* as attributing Jones Act "vessel" status to the Texas Tower, 692 F.2d at 342; see also *Simko v. C & C Marine Maintenance Co.*, 594 F.2d 960, 970 (3d Cir.)(Gibbons, J., dissenting)(apparently reading *Grimes* to have treated the Texas Tower as a "vessel"), cert. denied. 44 U.S. 833 (1979).

excluded from LHWCA if he has a permanent attachment[76] to a vessel in navigation[77] and performs work principally devoted to the operation and welfare of the vessel.[78] The per curiam decisions suggest that "permanent attachment" is not an invariable requirement,[79] that "vessels" include special-purpose structures not usually thought of as vessels but designed to float and move from time to time on navigable water,[80] and that a vessel can be "in navigation" although inoperable for a lengthy period undergoing major rehabilitation.[81] The Court's guidance has thus been quite general; the task of specifying the limits of the suggested criteria has been left to the lower courts, assisted by the admonition that most status issues are questions of fact.

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[76] *Norton*, 321 U.S. at 573.

[77] *Desper*, 342 U.S. at 191.

[78] *Senko*, 352 U.S. at 374; *Norton* 321 U.S. at 572.

[79] *Butler*, 356 U.S. at 271; *Grimes*, 356 U.S. at 252.

[80] *Gianfala*, 350 U.S. at 879.

[81] *Butler*, 356 U.S. at 271.

Robertson Supra, at pp. 91-92.

IV. DEVELOPMENT OF THE TEST FOR SEAMAN STATUS BY THE CIRCUIT COURTS

For the past thirty years, the task has fallen to the circuit courts to articulate a workable standard for seaman status which will be in accord with the guidelines established by the Supreme Court in the cases previously discussed. Not long after the Supreme Court's last pronouncement in *Butler*, supra, the Fifth Circuit, in which the majority of seaman's cases arise, established their test in the case of *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959).

The first thing to be noted about the *Robison* opinion is that it was written by Judge John Minor Wisdom, possibly the most distinguished jurist ever produced by the Fifth Circuit.[7] Judge Wisdom attained national prominence with his opinions in the field of civil rights but he is also highly revered in our area as the author of the definitive seaman status test he so meticulously set forth in this case. In this opinion, Judge Wisdom thoroughly reviews the history discussed in Part III. Every line of his carefully formulated holding is derived from Supreme Court authority.

Robison was a member of the lowest echelon of the oil field work force – a "roughneck" in a drilling crew aboard a mobile drilling platform, the Offshore No. 55. A roughneck's job includes all of the hardest manual labor necessary to complete the drilling and rigging of an oil well. The "Offshore No. 55" was a drilling rig mounted on a barge which, at the time of Robison's injury, was resting on the bottom of the Gulf of Mexico. The barge had no means of self-propulsion, but was towed to its intended location. Once in place, its retractable legs were lowered to the seabed and the deck of the barge was lifted above the water level by means of hydraulic jacks. Robison was injured when a forty-foot "joint" of casing, weighing 1620 pounds, broke loose and struck a section of pipe into which Robison's foot was lodged, severely fracturing his leg.

Robison sued his employer for negligence under the Jones Act; he also filed the traditional seaman's actions

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[7] Judge Wisdom was the 1988 recipient of the Edward J. Devitt Distinguished Service to Justice Award. The text of the presentation, set forth at 888 F.2d XCIII-CXXIV, details Judge Wisdom's many accomplishments in the fields of civil rights, admiralty, evidence, labor law, antitrust and the Louisiana Civil Code.

for unseaworthiness and maintenance and cure. Offshore Company denied Robison's status as a seaman, alleging that he was a member of a drilling crew and had no duties in connection with the navigation, maintenance or operation of the Offshore No. 55. A jury returned a verdict in Robison's favor, after the lower court denied defense motions for directed verdict and judgment notwithstanding the verdict. Offshore Company appealed.

Judge Wisdom formulated the issues before the court as follows:

> (1) What is required in law to constitute a maritime worker a seaman and a member of a crew?
>
> (2) In the circumstances of this case, is the question one for the court or for the jury?
>
> Id. at 773, footnote omitted.

The court began its analysis with the basic principle that the Jones Act has always been interpreted broadly, citing *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 47 S.Ct. 19, 71 L.Ed. 157 (1926). Following *Haverty*, with the enactment of the LHWCA, courts recognized that the Jones Act applied to "one who does any sort of work aboard a ship in navigation". *Robison*, supra at 774, citing *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991, 995 (1st Cir. 1941). Judge Wisdom notes:

> Whatever may have been the original intention of Congress, courts have given an extremely liberal interpretation to the terms "seaman" and "member of a crew of any vessel" without provoking any congressional amendments restricting the coverage of the act.

Judge Wisdom next discusses *Gianfala v. Texas Company*, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775 (1955), which he characterizes as "the key case in the conversion of offshore oil field workers into seamen". The four cases cited by the Supreme Court in its reversal of the holding that the member of a drilling crew was not a seaman

(*South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 60 S.Ct. 544, 84 L.E. 732 (1940); *Summerlin v. Massman Construction Co.*, 199 F.2d 715 (4th Cir. 1952); *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F.2d 383 (6th Cir. 1953) and *Gahagan Construction Corp. v. Armao*, 165 F.2d 301, 305 (1st Cir. 1948)) are carefully considered by the court to determine their "common denominators" which were:

> (1) The claimants are not ordinarily thought of as "seamen" aboard "primarily in aid of navigation", although they may serve the vessel in the sense that the work they perform fits in with the function the vessel serves. Gianfala was a member of a drilling crew on a submersible barge, Summerlin a fireman on a derrick, Wilkes a common laborer on a dredge, Gahagan a deckhand on a dredge. They had absolutely nothing to do with navigation, as such, nothing to do with the operations or welfare of a vessel in the sense that a vessel is a means of transport by water, and were not members of a ship's company in the sense that ship's cook or carpenter are necessary or appropriate members of a ship's complement. *But in the light of the function or mission of the special structure to which they were attached, they served in a capacity that contributed to the accomplishment of its mission in the same way that a surgeon serves as a member of the crew of a floating hospital.* The Bassett decision is the only one of the four cited in which there was judicial sanction of the requirement that the Jones Act seaman must be aboard "primarily in aid of navigation", and in that case the question at issue was the sufficiency of the evidence to justify a holding under the Longshoremen's Act. (2) The "vessels were not conventional vessels but special-purpose structures that in one case was on the bottom of the sea.
> In other words, under the Jones Act a vessel may mean something more than a means of transport on water.
> *Robison*, supra at 776, footnote omitted.

Discussion of the *Senko* case leads Judge Wisdom to the conclusion that the attributing of seaman status to a handyman aboard a dredge constituted further erosion of a strict construction of the phrase "aboard naturally and primarily in aid of navigation". *Robison*, supra at 777. This conclusion is also consistent with the Supreme Court's holdings in *Grimes* and *Butler*, supra.

Turning to the question of who should be allocated the duty of determining the status, Judge Wisdom finds ample support for his conclusion that the issue is primarily one of fact, to be taken from the jury only when there is no reasonable evidentiary basis to support a finding of seaman status. *Robison*, supra at 778-79.

Relying on the foregoing authority, Judge Wisdom formulates the Fifth Circuit's test for seaman status as follows:

> There is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.
> *Robison*, supra at 779, footnotes omitted.

Applying this test, Robison was found to be a seaman, since his duties aboard Offshore No. 55 "contributed to her mission, to the operating function she was designed to perform as a sea-going drilling platform". Id.

Finally, Judge Wisdom concluded that this determination was in keeping with the spirit and purpose of

the Jones Act. See discussion at 266 F.2d 780 and in Part V, infra.

The development of the test for seaman status in other jurisdictions has generally been in line with that of the Fifth Circuit.

The Eighth Circuit follows the same rule as the Fifth Circuit. *Miller v. Patton-Tully Transp. Co., Inc.*, 851 F.2d 202, 204 (8th Cir. 1988), appeal after remand, 878 F.2d 1103 (8th Cir. 1989). See also *Slatton v. Martin K. Eby Const. Co.*, 506 F.2d 505 (8th Cir. 1974).

The Eleventh Circuit (once part of the Fifth), also follows the *Robison* rule. See *Caruso v. Sterling Yacht and Shipbuilders, Inc.*, 828 F.2d 14, 15 (11th Cir. 1987), citing *Robison*, and the recent case of *Archer v. Trans/American Services. Ltd.*, 834 F.2d 1570 (11th Cir. 1988), according seaman status to an assistant pantryman aboard a cruise ship injured in a car accident while on shore leave.

The Ninth Circuit, according to *Ramos v. Universal Dredging Corp.*, 547 F.Supp. 661 (D.Hawaii 1982), follows the Fifth Circuit's interpretation of the "aid to navigation" requirement:

> The Plaintiff argues that (the aid to navigation requirement) is liberally construed by the courts, and that this test is met if the worker is found to have "contributed to the function of the vessel." The Defendant proposes a more narrow reading of this prong of the test.
>
> It is clear that the term "seaman" is not limited only to those who "hand, reef and steer". In *Robison*, supra, the Fifth Circuit, noted that even a cook or an engineer can be considered "in aiding navigation". The court further noted other cases that have extended the "in aid of navigation" test to oil field workers aboard a submersible drilling barge, a handyman on a dredge anchored to shore, a pile driver assigned to a radar station tower being constructed at

> sea, an employee doing odd jobs around his employer's wharf, a fireman on a floating derrick, laborers aboard barges collecting gravel pumped up from a river bottom and deckhands aboard a dredge.
>
> Most courts, including the Ninth Circuit, appear to have accepted *Robison*'s liberal interpretation of the "in aid of navigation" requirement. See, *Buna v. Pacific Far East Line, Inc.*, 441 F.Supp. 1360 (N.D.Cal. 1977); *Bullis v. Twentieth-Fox Film Corp.*, 474 F.2d 392, n.10 (9th Cir. 1973); *Baker v. Pacific Far East Lines, Inc.*, 451 F.Supp. 84 (N.D.Cal. 1978); *Lawrence v. Norfolk Dredging Co.*, 319 F.2d 805 (4th Cir. 1963). *Contra, Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), cert.den., 423 U.S. 1054, 96 S.C. 785, 46 L.Ed.2d 643 (1976).

See also *Estate of Wenzel v. Seaward Marine Servs., Inc.*, 709 F.2d 1326, 1328 (9th Cir. 1983).

The Fourth Circuit set forth their test for status in *Whittington v. Sewer Const. Co., Inc.*, 541 F.2d 427, 436 (4th Cir. 1976):

> To qualify as a "member of the crew" under the Jones Act one must be more or less permanently attached to a vessel or fleet; he must be one whose duties serve "naturally and primarily as an aid to navigation" *in the broadest sense*, and the vessel must be in navigation. (emphasis added)
>
> See also *Hill v. Diamond*, 311 F.2d 379 (4th Cir. 1962), citing *Robison*.

In *Searcy v. E. T. Sliker, Inc.*, 679 F.2d 614 (6th Cir. 1982), the court reversed summary judgment denying seaman's status to the plaintiff, who was a security guard at the defendant's sand and gravel business on the Ohio River. The plaintiff was required to board the vessels docked at the plant every two hours to check their gas pumps. He sometimes had to set lanterns. The *Searcy* court cites the *Robison* test and notes that it is virtually

the same as that cited above. *Searcy v. E.T. Sliker, Inc.*, supra at 616. Summary judgment was granted by the court below on the basis of the plaintiff's failure to satisfy the "aid in navigation" prong of the test. Reversal was mandated in view of the "broad construction to be given the "aid in navigation" requirement. Ibid. Prior to *Searcy*, in *Luckett v. Continental Engineering Co.*, 649 F.2d 441 (6th Cir. 1981), the same test for status was recited and relied upon by the court. Luckett was an assistant crew chief of a survey team. During the winter months, the crew was required to travel to work sites in a sixteen foot boat. The crew used the boat about 60% of their workday during these months, for the purpose of transporting crew and equipment. The plaintiff was accidentally shot while on land when a gun in the boat discharged. Citing the Supreme Court cases of *Senko* and *Grimes*, the court held that there was a jury question as to seaman status. We would also direct the court to the recent case of *Petersen v. Chesapeake & Ohio Ry. Co.*, 784 F.2d 732, 738 (6th Cir. 1986), which held, "One who works aboard a ship 'in navigation' satisfies the 'in aid of navigation' requirement if his duties contribute to the operation of the vessel." The plaintiff in that case was a shore-based mechanic who performed maintenance and repairs on ferries while sailing between ports.

The Second Circuit has likewise adopted *Robison*, see *McSweeney v. M. J. Rudolph Corp.*, 575 F.Supp. 746 (E.D.N.Y. 1983). A case with a good discussion of the "aid in navigation" requirement, which accorded seaman status to a scowman, was *Demarac v. American Dredging Co.*, 486 F.Supp. 853 (S.D.N.Y. 1980):

> Defendant argues that plaintiff's duties in connection with the operation and maintenance of the scow are not connected with the actual navigation of the vessel and do not require the skills of a traditional seaman, and that plaintiff's connection with the vessel was not permanent

because he supplied his own food and worked only a three-day split.

A worker aboard a vessel need not perform the traditional duties of a ship's crew to be a Jones Act "seaman". "The remedies afforded by the Jones Act . . . are designed to protect those who perform services upon ships and are exposed to the unique hazards of work upon the sea . . . The courts have long given seaman status to those performing tasks not necessary to the actual navigation of the ship". *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165, 170 (2d Cir. 1973) (holding a ship's hairdresser was a "seaman"). Where plaintiff was the sole operator of the scow and the totality of functions required to be performed aboard the vessel were of necessity in his charge; where plaintiff lived on the vessel during this work periods and had been assigned to that particular vessel for a month and to similar scows for seven years, it is apparent that his presence aboard the vessel was neither transient nor fortuitous and his tasks were central, not peripheral to the vessel's operation and mission.

(citations omitted)

also *Weiss v. Central R.R.*, 235 F.2d 309, 312 (2nd Cir. 1956); *Harney v. Moore*, 359 F.2d 649 (2nd Cir. 1966)

The First Circuit also followed the *Robison* test in *Bennett v. Perini Corp.*, 510 F.2d 114, 115 (1st Cir. 1975). In that decision, the court held that there was a jury question as to status in the case of a carpenter who fell from a bridge pier under construction. See also *Stafford v. Perini Corp.*, 475 F.2d 507, 510 (1st Cir. 1973).

The Third Circuit is said to have rejected the *Robison* standard in favor of a requirement that the injured employee contribute to the transportation function of the vessel. See the dissents from denial of certiorari in *International Oilfield Divers, Inc. v. Pickle*, 479 U.S. 1059, 107

S.Ct. 939, 93 L.E.2d 989 (1987), citing *Simko v. C & C Marine Maintenance Co.*, 594 F.2d 960, 964-965 (3rd Cir. 1979), cert. den., 444 U.S. 833, 100 S.Ct. 64, 62 L.E.2d 42 (1979) and *Lormand v. Aries Marine Corporation*, 484 U.S. 1021, 484 U.S. 1031, 108 S.Ct. 739, 98 L.E.2d 774 (1988). In that case, the court held that a maritime worker *who did not actually go to sea*, but who is injured on a vessel, must show that he performed significant navigational functions to be a seaman. But later cases in the Third Circuit have confined that decision to its facts. For example, in *Etu v. Farleigh Dickinson University West Indies*, 635 F.Supp. 290 (D.Virgin Islands 1986), the plaintiff was a diver assigned to service and supply aquanauts in a hydrolab habitat anchored fifty feet beneath the water's surface who contracted decompression sickness. In that case, the court applied the test for seaman status used by the Fifth Circuit, *Etu v. Farleigh Dickinson University West Indies*, supra at 293), also citing *Wallace v. Oceaneering Intern.*, 727 F.2d 425 (5th Cir. 1984).

In *Lynn v. Heyl and Patterson, Inc.*, 483 F.Supp. 1247, 1251 (W.D. Pa. 1980), the court held that *Simko* stands only for the proposition that one who works at the water's edge on a temporary basis is not a seaman.

Davis v. Sedco Forex, 660 F.Supp. 85, 86-87 (E.D.Pa. 1987) accorded seaman status to a driller on a drilling rig off the coast of Angola:

> This Court in analyzing the "in navigation" requirement noted that it merely required the vessel to be engaged as an instrument of commerce or transportation on navigable waters. Also, offshore drilling rigs have been considered vessels.
>
> The Third Circuit has had occasion to examine the "in navigation" requirement. Four years after *Griffith*, 521 F.2d 31 (3rd Cir. 1975) the Court of Appeals stated "the clear import of our opinion in *Griffith* is that a maritime worker

> who does not actually go to sea but who is injured while performing duties on a navigable vessel must establish that he performed significant navigational functions with respect to that vessel in order to recover under the Jones Act". *Simko v. C & C Marine Maintenance Co.*, 594 F.2d 960, 964-5 (3d Cir. 1979) (emphasis added); See also *McNeill*, 1986 A.M.C. at 2251 n. 13 ("where plaintiff is a traditional blue-water seaman, proof of actual navigational functions is not required . . . ") When a maritime worker is on the high seas and is subject to the risks which face traditional seamen, the "in navigation" requirement should be applied liberally. See *Mietla v. Warner Co.*, 387 F.Supp. 937, 939 (E.D. Pa. 1975).
>
> (citations omitted)

And in *Gallop v. Pittsburgh Sand and Gravel, Inc.*, 696 F.Supp. 1061, 1061-63 (W.D.Pa. 1988), seaman status was given to a crane operator on a dredging barge injured off the vessel. The case distinguishes *Simko* on the ground that, in *Simko*, "plaintiff was primarily a shore-based employee whose presence aboard the vessel was incidental and related to his shore-based activities".

Therefore, under the test now in use in the Third Circuit, Jon Wilander, whose employment required him to actually go to sea and face all the perils attendant thereto, would clearly be entitled to seaman status.

Into this long established body of jurisprudence, dating back over a century, we must now interject the anamolous Seventh Circuit decision of *Johnson v. John F. Beasley Construction Company*, 742 F.2d 1054 (7th Cir. 1984). Plaintiff Johnson was the foreman of a crew of ironworkers engaged in bridge construction on a barge in the Illinois River. The barge was used as a work site and for the transportation of construction materials. On the day of Johnson's injury, the tugboat used to propel the barge collided with a beam protruding over the edge of the barge. The beam struck Johnson's leg, causing injury which resulted in amputation.

The opinion begins with the court's frank admission that "(C)laims brought under the Jones Act have not been litigated frequently in this circuit". 742 F.2d at 1056.[8] The Court discusses the *Bassett, Norton,* and *Desper* decision, as well as *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F.2d 383, 388 (6th Cir. 1953), which set out the now familiar three-prong test for status under the Jones Act: "(1) that the vessel be in navigation; (2) that there be a more or less permanent connection with the vessel; and (3) that the worker be aboard primarily to aid in navigation". Surprisingly, the court notes that prior jurisprudence mandates a liberal construction of the "aid in navigation" requirement:

> (I)n construing the third requirement, the *Wilkes* court itself noted that it should not be confined to those who "hand, reef and steer", but is applicable "to all those whose duties contribute to the operation and welfare of the vessel". Ibid, relying on the Supreme Court's statements in *Norton,* supra at 1058-59.

The court continued by reviewing *Gianfala, Senko, Grimes* and *Butler* but was able to discern "few clues as to what the critical factors are in determining crew status". 742 F.2d 1059. *Offshore Co. v. Robison* is given brief mention, although the court notes that *Robison* "synthesized then-existing case law" Id. at 1060, note 3) and admits that "(t)he *Robison* test has been accepted by many courts not only as a test of whether a case should go to the jury in a Jones Act dispute, but also as a test to be used 'in delimiting the power of the factfinder to deny or confer

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[8] This, of course, is not surprising, since the states which comprise the Seventh Circuit (Illinois, Wisconsin and Indiana) are not likely to be home to much sea-faring activity. The Fifth Circuit, on the other hand, is home to the vast majority of offshore oil and gas production.

[seaman's] status' ". Id., footnotes omitted, citations omitted.

The *Johnson* court then concludes that the third prong of the *Robison* test should not be followed because "it accords insufficient weight to the relationship between the employee and the *transportation function* of the vessel". Id. at 1061, emphasis supplied by the court. No authority is given for this conclusion. The court then criticizes Judge Wisdom for attaching too much importance to *Gianfala, Grimes,* and *Butler* and concludes that these cases are "anomalous in giving insufficient attention to the employee's duties as they relate to the transportation function of the vessel". Ibid.

The court contends that *Bassett* and *Norton* "(emphasized that) activities contributing to the operation and welfare of the vessel as a means of transport on water are critical to jurisdiction under the Jones Act". Ibid. But in fact, the court in *Senko* stated that *Bassett* had been misunderstood and should be read as standing for the principle that a fact-finder's decision on status is final if it has a reasonable basis. Further, *Senko* de-emphasized the importance of the aid in navigation requirement. See discussion supra, at pp. 19-21. Further, how can *Norton* be said to emphasize the transportation function of the vessel – *when the vessel in that case never went to sea*. See discussion supra at p. 14.

The Court goes on to conclude:

> . . . we believe it is the employee's relation to the transportation function of the vessel, i.e., whether the employee contributes to the maintenance, operation, or navigation of the vessel as a means of transport on water, that is critical for Jones Act purposes. Such an interpretation fulfills what we believe to be the central purpose of the Act; to provide protection for those subjected to risks associated with the transportation

function of vessels on navigable waters. p. 1061-62, Id. at 1061-62.

Supposedly, "(T)his view is consistent with the approach the Third Circuit has taken . . . " Id. at 1062 Yet, as stated earlier, the later decisions in the Third Circuit, and *Simko* itself, indicates that the concern is that seaman status be accorded workers who face *the perils of the sea* – not just those involved in transportation functions. See cases cited supra at pp. 32-33.

Finally, the court concludes that the barge in this case was a vessel in navigation but had no crew aboard. Instead, the court concludes that the "crew" of the barge were the "operators of the work boats and tugs and the deckhands assigned to them that pushed (the barge)". Id. at 1064. Again, no authority is cited for this unique conclusion.

The Fifth Circuit had the opportunity to reject thirty years of case law and adopt the *Johnson* rationale when they reconsidered the continued viability of *Robison* in *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986). But the court chose not to do so.

Plaintiff, Barrett, was a welder's helper whose crew performed maintenance and repair services for stationary offshore platforms in the Gulf of Mexico. The structures involved were stationary, not movable, drilling structures located on the outer Continental Shelf. The latter have been recognized as "vessels" by this court in *Gianfala* and *Herb's Welding v. Gray*. Therefore, the plaintiff was required to show that he had a substantial connection to a vessel. Some of the platforms were too small for the work to be performed without a standby barge, which was utilized 30% of the time. Barrett and his crew ate and slept on a nearby fixed platform. He was injured while being transported via personnel basket from a crew boat to the standby barge.

The Court began its analysis discussing the pertinent Supreme Court decisions, including *Haverty, Barrett, Norton, Gianfala, Senko, Grimes* and *Butler*. These cases were the background for and basis of *Robison*, and explained Judge Wisdom's omission of the "aid to navigation" language from the *Robison* test. As Judge Wisdom held (at 266 F.2d 780, cited in *Barrett* at 781 F.2d 1072):

> Our review of the cases shows this test has been watered down until the words have lost their natural meaning . . . we attach less importance to either of these catchphrases than we do to the cases piled on cases in which recovery is allowed when by no stretch of the imagination can it be said that the claimant had anything to do with navigation and is a member of the ship's company only in the sense that his duties have a connection with the mission or the function of the floatable structure where he was injured.

The court also reiterated the second important holding of *Robison* – emphasizing the all important role of the fact-finder in determining status questions. (at 781 F.2d 1072-73).

The Court gave short shrift to the arguments that *Robison* erred in eliminating the "aid in navigation" requirement or that the second prong of the test should be modified to grant status only to those workers which contribute to the "transportation function" of the vessel.

> We cannot accept either of these suggestions, because as Judge Wisdom cogently and convincingly explained in *Robison*, the later Supreme Court cases require such a broad definition of "aid to navigation" that the test proposed by amici is entirely inconsistent with them.
>
> 781 F.2d at 1073.

The remainder of the original opinion discusses the degree of attachment to the vessel required to attain seaman status, an issue not before the Court today.

It is important to note that the rehearing in *Barrett* was not granted to consider whether the "mission seaman" concept of the *Robison* case should be abandoned in favor of *Johnson's* "transportation function" approach. The court apparently wished to re-examine the degree of vessel-connexity required by *Robison*. Professor Robertson, in his article on seaman status, reproduces the directive of the Clerk to counsel as follows:

> On April 9, 1985, the Fifth Circuit Clerk wrote to *Barrett* counsel, noting the Court's grant of rehearing en banc on that date, inviting amicus briefs from the Louisiana Association of Defense Counsel and the Louisiana Trial Lawyers Association, and directing the parties to brief the following questions:
>
> What, if anything, should be done to reduce the uncertainties that have evolved from the application of some portions of the *Offshore [Co.] v. Robison* test? Consider the following areas in addition to any others that you may wish to include:
>
> (1) How can "permanent", in the "more or less permanent" attachment to a vessel or fleet of vessels prong of the test, be given more substance?
>
> (2) Should we reconsider the definition of "fleet of vessels" in the same prong of the test?
>
> (3) Can the definition of "substantial portion of his work on the vessel" prong of the test be given more substance and content?
>
> Letter from G. Ganucheau, Clerk of the Fifth Circuit, to All Counsel of Record, *Barrett v. Chevron* (April 9, 1985) (copy on file with author). Robertson, supra at 116, n. 224.

The finder of fact determined that Barrett usually spent twenty to thirty per cent of his time working aboard vessels through his year of employment in the Bay Marchand field. However, in the eight day period immediately preceding his injury, Barrett worked aboard a vessel eighty per cent of his work day. Holding that his status must be determined in the context of his entire term of employment, status was denied, since the twenty to thirty per cent of his work time spent aboard vessels could not be considered "substantial".

Judge Alvin B. Rubin dissented, joined by five other members of the panel, but only from that portion of the opinion addressing the degree of attachment. The dissenters would have made *no* modification of the *Robison* rule. No where in the dissent is any dissatisfaction expressed with the "mission seaman" portion of the *Robison* test. Rather, Judge Rubin and the other dissenters felt that, especially in the case of offshore oil workers assigned to hitches of limited but definite duration, more emphasis should be placed on the duties of the worker during the hitch on which he was injured.

The four concurring judges did express their preference for the *Johnson* rule. The brief opinion was written by Judge Gee, and among those adopting it was Judge Jones. It is important to note that Judge Jones and Judge Gee were on the panel which decided the instant case in the Fifth Circuit. (*Wilander v. McDermott Intern., Inc.*, 887 F.2d 88 (5th Cir. 1989)). Judge Gee, writing for the court, rejected defendant's suggestion that the *Johnson* rule be adopted.

> The Supreme Court has not . . . held that our Circuit's test is incorrect and that of the Seventh Circuit correct. Absent such a holding by the Supreme Court, we must adhere to our en banc decision in *Barrett*, which reaffirmed the validity of the *Robison* test. Under that test, there was

sufficient evidence to support the jury's finding that the plaintiff had status as a seaman.

Id. at 90-91.

V. POLICY GUIDELINES AND CONGRESSIONAL INTENT GOVERNING SEAMAN STATUS DETERMINATIONS

The task of formulating a workable test for determination of seaman status must seek to implement the policy behind the Jones Act. The foundation of Jones Act coverage is exposure to the perils of the sea. See *Mungia v. Chevron Co., U.S.A.*, 675 F.2d 630, 633 (5th Cir. 1982), quoting *Robison*, supra at 771. This is due to the fact that exposure to the "perils of the sea" is a distinguishing characteristic of the work of a seaman. Robertson, supra at 80, citing *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104 (1946)(Stone, C.J., dissenting).[9]

This Court has recognized the dangers inherent in the locale of a seaman's workplace, including isolation and distance from shore, in *Herb's Welding, Inc. v. Gray*, 105 S.Ct. 1421, 1435 n. 10, 1438, 1440 n.20 (1985)(Marshall,

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[9] Professor Robertson also cites the following cases which refer to the importance of the plaintiff's exposure to the perils of the sea in determining seaman status. (at p. 99, n. 116)

Wallace v. Oceaneering Int'l, 727 F.2d 427, 436 (5th Cir. 1984); *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240, 243, 245 (5th Cir. 1983), cert. denied, 464 U.S. 1069 (1984); *Davis v. Hill Eng'g, Inc.*, 549 F.2d 314, 327 (5th Cir. 1977); *Litherland v. Petrolane Offshore Constr. Servs., Inc.*, 546 F.2d 129, 130 (5th Cir. 1977); *Kimble v. Noble Drilling Corp.*, 416 F.2d 847, 849 (5th Cir. 1969), cert. denied, 397 U.S. 918 (1970); *Atkins v. Greenville Shipbldg. Corp.*, 411 F.2d 279, 283 (5th Cir.), cert. denied, 396 U.S. 846 (1969); *Berry v. American Commercial Barge Lines*, 114 Ill. App. 3d 354, 450 N.E.2d 436 (1983), cert. denied, 465 U.S. 1029 (1984).

J., dissenting). See also *Pure Oil Co. v. Snipes*, 293 F.2d 60, 66-67 (5th Cir. 1961) and Int'l Labor Office, "Safety Problems in the Offshore Petroleum Industry" 19-27 (1978).

In the *Robison* case, Judge Wisdom was guided by the primary objective of implementing this policy, and recognized that nowhere are the perils of the sea more evident that in the milieu of offshore oil drilling.

> There is no reason for lamentations. Expansion of the terms "seaman" and "vessel" are consistent with the liberal construction of the Act that has characterized it from the beginning and is consistent with its purposes. Within broad limits of what is reasonable, Congress has seen fit to allow juries to decide who are seamen under the Jones Act. There is nothing in the act to indicate that Congress intended the law to apply only to conventional members of a ship's company. The absence of any legislative restriction has enabled the law to develop naturally along with the development of unconventional vessels, such as the strange-looking specialized watercraft designed for oil operations offshore and in the shallow coastal waters of the Gulf of Mexico. Many of the Jones Act seamen on these vessels share the same marine risks to which all aboard are subject. And in many instances Jones Act seamen are exposed to more hazards than are blue-water sailors. They run the risk of top-heavy drilling barges collapsing. They run all the risks incident to oil drilling.
>
> *Robison*, supra at 780.

The dangers faced by the seaman are both psychological and physical. Robertson, supra at 81, citing L. Hunt, *Safety of Life Offshore: Motivation and Psychological Stress in Offshore Operations* 32 (1983). It is because of their exposure to these special physical and psychological hazards that the maritime law gives special solicitude to the wards of the courts of admiralty. Robertson, supra at 81.

As a limitation on the implementation of this policy, this Court has imposed the requirement that a seaman be a member of the crew of a vessel. *Swanson v. Marra Brothers*, supra. As a result, some workers who do indeed face the perils of the sea will be denied seaman's status. It is logical to exclude longshoremen and other inshore workers, who perform their services only while the vessel is securely moored, since these employees do not face the same dangers as do seamen. The *Robison* requirement that an employee perform a substantial amount of his work aboard a vessel or an identifiable fleet serves this purpose by precluding these amphibious inshore workers from attaining Jones Act coverage. Also excluded are those involved in drilling operations of fixed, or stationary oil drilling platforms. But, as Professor Robertson has noted (supra at 100-101):

> Offshore platform workers unquestionably confront many of the perils of the sea; nevertheless, they are excluded from seaman status as a matter of Supreme Court construction of congressional language,[124] and not because it would strain the policy of the seaman's protections to cover them.

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[124] *Swanson*, 328 U.S. at 6, reads the 1927 LHWCA as effectively amending the Jones Act; *Rodrigue*, 395 U.S. at 352, was principally a construction of the Outer Continental Shelf Lands Act, 43 U.S.C. 1331-1356 (1982); *Herb's Welding, Inc.*, 105 S.Ct. at 1421, construed the 1972 amendments to LHWCA, 33 U.S.C. 902(3), 903(a) (1982).

However, the Supreme Court has recognized, in both the *Gianfala* and *Herb's Welding* cases, that floating offshore rigs are indeed vessels. See the opinion of the majority at 105 S.Ct. 1424, n. 2 and of the dissent at p. 1430 n. 1.

The consistency of such a distinction has eluded many commentators, and is well summarized as follows,

in Fallon, "The Test of Seaman Status" 55 Tulane L. Rev. 1010, 1023 (1981) (footnotes omitted).

> The *Robison* court observed that many offshore workers share the same marine risks as traditional sailors. They run the risk of exposure to the sea and all of its idiosyncrasies; they also run the risks incident to oil drilling. If the tacit underlying justification for extending the Jones Act to cover the offshore worker permanently assigned or performing a substantial part of his work aboard a movable rig is the danger inherent in the offshore industry, one might argue that those employed aboard a fixed platform should also be covered since the dangers to which they are exposed are no less ominous. Moreover, if the application of the Jones Act to the movable rig employee is based upon his exposure to the risks of the maritime atmosphere one might reasonably suggest that such risks are no less for his brother laboring on a fixed platform. This equivalence is particularly true when the movable rig is in the drilling mode resting on the seabed. Whether such a distinction should exist is debatable, but the fact remains that a distinction is made between the remedies available to the movable rig employee and his counterpart on the fixed platform when these employees are injured or killed in the course of their employment.

The policy behind the Jones Act would best be served by abolition of distinctions between workers on fixed platforms and other offshore workplaces which are classified as vessels. However, such a change is unnecessary to accord seaman status to Mr. Wilander. This man was accorded seaman status by virtue of the fact that he spent at least 80% of his time working aboard a barge and vessels whose special mission it was to serve as "paint boats." Without Wilander and his crew of painters and sandblasters, the paint boats did not navigate at all, for then they had no mission. This man faced the perils of the

sea every single day he worked for McDermott International. The already hazardous nature of the operations being conducted in the Persian Gulf was compounded by the fact that the business at hand was being conducted over water, and communications between supervisors and employees separated by miles of open sea were hopelessly botched. This, in fact, was the cause of Wilander's injury.

Any discussion of the relative merits of the *Johnson* and *Robison* formulae must begin with the acknowledgement that the two decisions hardly stand on equal footing. As the Fifth Circuit noted in *Barrett*, the *Robison* standard is one which has withstood the test of time and the changing needs of maritime commerce. As of the writing of *Barrett*, it had been cited 95 times and, as discussed supra, had served as the means by which most other circuits determine status questions arising in their own jurisdictions. (*Barrett*, 781 F.2d at 1073) The *Johnson* court, on the other hand, acknowledged their unfamiliarity with admiralty cases (742 F.2d at 1056) and then, instead of choosing to benefit from the wisdom of experience, opted to create its own unique interpretation of the proper test to be applied.

More importantly, *Robison*, unlike *Johnson*, is consistent with precedent established by this Court. The holding of the *Johnson* decision cannot be reconciled with the holdings of this Court in *Gianfala, Grimes, Norton, Senko* and *Butler*. What the court in *Johnson* failed to realize is that the "navigational function" criterion has "a long but conspicuously undistinguished history in the seaman status jurisprudence" and is "too exclusive, eliminating from seaman status such paradigmatic sailors as cooks on river tugs." Robertson, supra at 113. Professor Robertson goes on to explain the problems with the *Johnson* rule as follows:

> The *Johnson* opinion badly misses the boat in a number of respects. First, the language of its

> holding makes no distinction between offshore workers, who clearly confront the perils of the sea, and amphibious inshore workers, who typically do not. To require offshore vessel workers like the *Robison* plaintiff to show that their work contributes to the drilling rig's "transportation function" would remove most of them from the seamen's protections, and they may well be the class of persons *who need those protections most*. A second and related criticism is that the *Robison* decision was not a stretching of the Jones Act for the indicated "equitable economic reasons," but meant what it said: Offshore oil rig workers are entitled to the seamen's protections because they work on vessels and "share the same marine risks to which all aboard are subject. And in many instances Jones Act seamen are exposed to more hazards than are blue-water sailors. They run the risk of top-heavy drilling barges collapsing. They run all the risks incident to oil drilling." Third, the "transportation function" focus is synonymous, or very nearly so, with the "navigational duties" criterion that has produced so much grief in the status jurisprudence; it will quickly prove either too restrictive or relatively meaningless. Fourth, the "transportation function" test is fully inconsistent with the Supreme Court's decisions in *Gianfalu* and *Grimes*, and is exceedingly difficult to reconcile with the opinions and outcomes in *Norton, Senko*, and *Butler*. Finally, *Johnson* reached the wrong result. Plaintiff sometimes worked on the construction barge when it was in motion, and he was hurt when the employer's tug ran into it. Even marginal sensitivity to the need to protect workers whose duties expose them to the risks attending the movement of vessels would have sent the *Johnson* case to the jury.
>
> Robertson, supra at 1144-1145.
>
> (emphasis added)

Another distinguished commentator notes:

The nub of difference between these two approaches is in the seaman status test applied to special purpose floating offshore structures that are designed not for transportation but for other purposes, such as drilling for oil and gas. The *Robison* formulation specifically includes such structures as "vessels" thereby qualifying workers attached to them as seamen. The "transportation function" interpretation of the Seventh Circuit, however, would disqualify these workers as seamen, remitting them to workers' compensation remedies under federal and state law. It is obviously easy for the Seventh (and Third) Circuits to adopt a test that excludes offshore workers since such structures do not exist within their jurisdictions and are not likely to in the future. For the Fifth Circuit to adopt the transportation function idea would mean, however, a repudiation of a consistent line of cases dating back at least to 1959.

Thomas J. Shoenbaum, *Admiralty and Maritime Law*, (1987) Section 5-5, p. 179-80 (footnotes omitted).

Moreover, the term "vessel" as defined in 1 U.S.C. 3 "includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." Therefore, it is patently illogical to require, as does the Seventh Circuit, that a worker perform transportation tasks to attain seaman status, since the vessel to which he is assigned need not be engaged in transportation to be considered a vessel.

Cited below is an excerpt from the Congressional Records for December 10, 1982.[10] Before Congress was an

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[10] A Bill to modify the Maritime Laws Applicable to the Recovery of Damages by Certain Foreign Seamen: Hearings on H.R. 4863 Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries, 97th Cong., 2d Sess. 21 (1982) (Statement of Representative John Breaux).

amendment to the Jones Act designed to exclude certain foreign seamen from Jones Act Coverage. In explaining the impact of the bill to his colleagues, Representative (now Senator) John Breaux of Louisiana assured them:

> It does maintain the full range of U. S. Jones Act protections U. S. courts currently afford U. S. citizens employed on both traditional merchant marine vessels and special purpose vessels engaged in exploration, development, or production of offshore mineral and energy resources, no matter where they are located.

Representative Breaux went on to state that the bill also intended Jones Act coverage for foreign seamen employed on special purpose vessels on the U. S. Outer Continental Shelf.

Therefore, it is clear that the most current expression of the will of Congress on this issue provides for a clear intent to accord seaman status to American citizens, such as Jon Wilander, who are injured aboard vessels which have a special purpose, such as the *M/V GATES TIDE*, even if those vessels and the duties of those aboard them are not that of the traditional merchant marine.

Uniformity and adherence to the policy behind Congressional enactments is indeed essential to the maritime law. But the break from uniformity, the break from policy, and the break from tradition was made by the *Johnson* court, not the Fifth Circuit. In order for uniformity to be achieved, the rule to be adopted must be designed to meet the needs of all jurisdictions. The Fifth Circuit, where special purpose vessels engaged in the business of offshore oil and gas production abound, is in need of a rule broad enough to accommodate the unique factual scenarios created by this environment. Although use of the Seventh Circuit rule *within that jurisdiction* might not severely frustrate of the need to protect those workers who face the perils of the sea and those who were meant by Congress to be covered by the Jones Act, a different result would obtain elsewhere in this country.

The writer is reminded of the ancient maxim "Ratio est legis anima; mutata legis ratione mutatur et lex."[11]

CONCLUSION

We have indeed progressed since the days when these words were written, and the offshore special purpose vessel will be known to future generations as the peculiar agent of maritime commerce of our time.

McDermott International expresses its lack of faith in the ability of a jury to understand such abstract concepts as "substantial amount of work." We would submit that this is certainly no more difficult for a juror to understand that the concept of "guilt beyond a reasonable doubt." All of the Supreme Court cases have, without exception, emphasized the importance of the role of the finder of fact in determining status questions.

> The Supreme Court's decisions suggest a consistent philosophy – that if courts will sometimes

[11] Reason is the soul of law; the reason of law being changed the law is also changed. Black, Henry C. *Black's Law Dictionary*. 4th ed. at 1429, citing *7 Coke 7*. Or, as another writer put it:

> It is universally conceded that the general principles of law must be applied to new kinds of property, as they spring into existence in the progress of society according to their nature and incidents, and the common sense of the community. In the early period of maritime commerce, when the oar was the great agent of propulsion, vessels were entirely unlike those of modern times – and each nation and period has had its peculiar agents of commerce and navigation adapted to its own wants and its own waters, and the names and descriptions of ships and vessels are without number.

Erastus C. Benedict, *The American Admiralty, Its Jurisdiction and Practice*. (1850) Sec. 241, pp. 133-34.

> err, they should err in the direction of over-inclusiveness. The Court's insistence on submitting all debatable status issues to juries is another way of saying that close calls should go to the worker. It is humanitarian bias.

Robertson, supra at 92.

In asking this Court to adopt the *Johnson* test, petitioners are seeking to have the Court repudiate the broad characterization of work which should be considered that of a seaman as set forth in *Norton, Senko, Gianfala, Grimes* and *Butler*. Petitioners are also suggesting that no one aboard a special purpose vessel dedicated to purposes other than transportation be considered a seaman, despite the recognition to the contrary in *Herb's Welding*. Petitioners request the court to deprive thousands of workers in the offshore oil industry of seaman status, when *these are the workers who need it the most*. Petitioners urge the Court to contravene the policy of protection to be accorded workers who face the perils of the sea by relegating them to less desirable remedies, or, as in Mr. Wilander's case, no remedy at all.

Petitioners seek to characterize offshore oil drilling as a "land-based" activity. What petitioners fail to realize is that this industry becomes maritime when it is performed on or from a vessel. In truth, almost any job performed on the sea has a land-based equivalent, or at least a parallel occupation which can be performed from the safety of a riverbank. To follow the reasoning of the Seventh Circuit, an employee would appear to be required to be chained to the helm twenty-four hours a day.[12]

[12] Since no one aboard a vessel "hands" or "reefs" any longer, it is presumed that the Seventh Circuit recognizes only those who "steer" as seaman.

What the *Johnson* court and petitioner have overlooked is that fact that a vessel cannot navigate at all unless everyone essential to her economic purpose is aboard. The paint boat in this case would have never left the "mother barge" without the paint crew aboard – they were essential to her economic mission. Likewise, fishing boats cannot sail without those who fish, whalers without those who harpoon. We would refer the court to the dissenting opinion in *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165, 173:

> I start with the proposition – conceded by the majority – that a beautician on a cruise ship is a seaman, just as are cooks, mess men, muleteers, bartenders, musicians, telephone operators, laundresses, and even barbers, when they are performing services that render the ship's voyage economically viable. A cruise ship which tried to attract female passengers without providing hairdressing services would soon be converted to duty as a cargo vessel.

And a "paint boat" which sailed without a paint crew would soon become a liability, rather than an asset, to its owner.

We ask the court to accommodate the changing needs of the maritime world, uphold the policy behind the Jones Act, and affirm.

Respectfully submitted,

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